No. 10,739 *//*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT COMPANY,
Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue of the United States for the First District of California,
Respondent.

APPELLANT'S OPENING BRIEF.

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JUDGMENT BELOW.

Appellant brought this action to recover an overpayment of income tax for the year 1936 resulting from the denial of a deduction for a loss sustained on the sale in that year of 300 shares of the capital stock of the Chase National Bank. Judgment denying the recovery and for respondent's costs was entered pursuant to findings of fact and conclusions of law on December 18, 1943. The Court below filed no opinion in the case.

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The appellant is a Nevada corporation authorized to do business in the State of California, with an office in the City and County of San Francisco. (R. 10.) On March 15, 1937, the appellant filed its income tax return for the year 1936 with the respondent, John V. Lewis, the then Collector of Internal Revenue for the First District of California, and paid the income tax shown due thereon to the respondent in installments on March 15, June 15, September 9 and December 23, 1937. (R. 11.) The respondent ceased to be Collector of Internal Revenue on March 6, 1938. (R. 11.) On March 13, 1940, the appellant filed with the Collector of Internal Revenue at San Francisco, California, a claim for the refund of $5370.56 being the amount of income taxes collected for the year 1936 by reason of the disallowance of the loss on the sale of the Chase Bank stock. (R. 21.) This claim was rejected on October 2, 1940, and notice of rejection and disallowance of the claim was mailed to appellant by registered mail on October 2, 1940. (R. 33.) The present complaint was filed on September 17, 1942. (R. 7.)

The District Court had jurisdiction of the action under Section 24 of the Judicial Code (U.S.C.A., Title 28, Section 41), the proceeding being a suit of a civil nature where the matter in controversy exceeds the sum of $3000.00, and arising under the laws of the United States, and also being a suit arising under a law providing for internal revenue. This

Court has jurisdiction of the appeal under Section 128, Judicial Code (U.S.C.A., Title 28, Section 225).

ABSTRACT OF CASE.

Appellant in its refund claim and in its complaint in the District Court claimed that it had overpaid its income tax for the year 1936 by reason of the following facts:

In the year 1930 appellant had purchased 300 units, each unit consisting of one share of the capital stock of the Chase National Bank of the City of New York (hereafter called "Chase Bank") and one share of the capital stock of the Chase Securities Corporation (hereafter called Chase Securities) at a total cost of $50,696.25. (R. 17.)

At the time of the purchase of these units, the stock of the Chase Bank and Chase Securities were not separately transferable. The Chase Bank and Chase Securities, however, were two separate corporations, the one a national banking association and the other a corporation organized under the laws of the State of New York and the unit holder was a voting stockholder in each corporation. The inseparability of the stock in connection with its transfer was achieved under the terms of an agreement dated March 21, 1937, by the device of printing the certificates of the respective stocks on the opposite faces of a single sheet of paper and an endorsement of the restriction on each face. (R. 12-14; Exhibit C, R. 19.)

Pursuant to the provisions of the Federal Banking Act of 1933 requiring the separation of national banks and their affiliates, the agreement of March 21, 1917, was terminated on June 14, 1934, and the certificate of incorporation on Chase Securities was amended to eliminate all provisions preventing the separate sale of its stock. (Stipulation of Facts, Paragraph X, R. 16.) The certificates representing the units were surrendered and, in exchange separate certificates were issued for an equal number of shares of the Chase Bank stock and, the Chase Securities having reduced its capitalization and changed its name, for Amerex Holding Corporation stock at the rate of one share of Amerex stock for each ten shares of Chase Securities stock. As a result, appellant on June 14, 1934, received certificates for 300 shares of Chase Bank stock and 30 shares of Amerex Holding Corporation stock. (Complaint, Paragraph VI admitted by the Answer, R. 5, and Stipulation of Facts, Paragraphs VI, VII, VIII and X, R. 12-15.)

On December 22, 1936, appellant sold the 300 shares of Chase Bank stock for $13,482.15. (Stipulation of Facts, Paragraph XI, R. 18.) In filing its income tax return for 1936 appellant did not take any deduction for the loss sustained on the sale of the Bank stock. (Stipulation of Facts, Paragraph V, R. 12.)

On March 13, 1940, within three years after the filing of its income tax return for the year 1936, appellant filed a claim for the refund of its 1936 income taxes in the amount of $5370.56, basing the claim on appellant's failure to deduct a loss of $22,005.23

on the sale of the 300 shares of Chase Bank stock. (Stipulation of Facts, Paragraph XII, R. 21.) A certified copy of the claim was received in evidence as Exhibit E. (R. 21-33.) In the refund claim appellant asserted that it was appropriate and feasible to make an allocation of the cost of the units between the Chase Securities stock and submitted data substantiating an allocation of the cost, 70% to the Bank stock and 30% to the Securities stock. On the basis of this allocation, appellant had overpaid its income tax for the year 1936 in the amount of $5370.56, as claimed.

As heretofore stated, on October 2, 1940, the claim for refund was rejected and notice thereof given as required by law. The suit in the District Court followed.

The answer of the respondent in the Court below raised no issue except as to the right of plaintiff to allocate the cost of the units between the component stocks and of the amount of the loss sustained. The case was submitted to the District Court on a stipulation of facts, expanding considerably the history of the Chase Bank and Chase Securities Corporation as set out in the complaint, and furnishing market quotations of the respective stocks immediately after the removal of the restriction on separate transfers and upon the deposition of Thomas C. Montgomery as to a fair allocation of the cost between the respective stocks as of the dates of the acquisition of the units.

The District Court found that the appellant's original investment was a single investment and that it was neither reasonable nor practicable to allocate to the two stocks a portion of the amount of appellant's original investment. Without finding as to the value of the component stocks as of the date of acquisition or as of the exchange of the units for separate certificates of stock, the Court ordered judgment for the respondent. (R. 70-71.)

SPECIFICATIONS OF ERRORS.

Appellant specifies the following errors on this appeal.

(1) The failure of the District Court to apportion the unit cost of the purchase of Chase Bank and Chase Securities stock between the constituent stocks for the purpose of determining a deductible loss on the sale of the Bank stock prior to a sale of the Securities stock.

(2) The failure of the District Court to apportion such cost either (a) on the basis of the respective values of the constituent stocks at the time of purchase or (b) upon the basis of the respective values of the constituent stocks at the times of the dissolution of the units.

(3) The determination of the District Court that it was neither reasonable nor practicable to allocate to the constituent stocks a portion of the amount of the original investment of the appellant.

(4) The finding of the District Court, there being no evidence to support the same, that appellant's original investment in the Chase Bank and Chase Securities stock was a single investment.

(5) The finding of the District Court, there being no evidence to support the same, that appellant did not allocate any portion of the original cost to the constituent stocks.

(6) The failure of the District Court upon the stipulated facts and the uncontradicted evidence, to order judgment for appellant for income taxes overpaid for the year 1936 by reason of the dissallowance of the loss on the sale of said Chase Bank stock.

SUMMARY OF ARGUMENT.

Appellant urges that under the law and regulations and upon the agreed statement of facts and uncontradicted evidence it was entitled to apportion the cost of the units of Chase Bank and Chase Securities stock between the two stocks for the purpose of determining gain or loss on a sale of either stock subsequent to the dissolution of the units, i.e., that it is appropriate and feasible to make an allocation of the cost of the units between the component stocks, and that such apportionment being required, it should be made either upon the basis of the respective values of the components at the date of acquisition or of those respective values at the date of the dissolution of the units.

ARGUMENT.

1. SCOPE OF REVIEW—WEIGHT TO BE GIVEN FINDINGS.

The crux of the case is disposed of by the trial Court in its finding III, reading:

> "The Court finds that it is neither reasonable nor practicable to allocate to each stock a portion of the amount of the original investment of the plaintiff".

Whether this is to be regarded as a conclusion from finding II, that appellant's original investment was "single" and that appellant did not at the date of purchase "allocate any portion of the original cost" to the several shares making up the units, findings without evidentiary support, or whether finding III is an independent finding of fact, it is not entitled any great weight in the determination of this appeal for the reason that the evidence was entirely documentary and by deposition, the testimony in which was uncontradicted.

This Court, in *Equitable Life Assurance Society v. Irelan,* 123 F. (2d) 462, 464, speaking through Circuit Judge Healy, in reversing a judgment against an insurance company based on a finding that the decedent's death was accidental, says:

> "Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while it is justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence and

we have the burden of doing that. Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, was intended to accord with the decisions on the scope of the review in federal equity practice; and, as is well known, in the federal courts where the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings."

See also:

Smith v. Royal Insurance Company, 125 F. (2d) 222, 224,

where this Court likewise reversed a judgment of the District Court, saying:

"The bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute. Accordingly the finding of falsity does not command the strong presumption of verity which usually attends a finding."

Norment v. Stillwell (C.C.A. 2nd Cir.), 135 F. (2d) 132;

O'Brien, *Manual of Federal Appellate Procedure* (1941) Supp. No. 2, p. 9.

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2. FINDINGS UNSUPPORTED.

(a) Finding II.

As already noted and specified as error, there is no support whatsoever in the record for the trial Court's finding II, reading:

"The Court finds that plaintiff's original investment made in 1930 in the Chase National

> Bank and its affiliate, Chase Securities Corporation, was a single investment; and that in making said original investment on March 3, 1930, plaintiff did not then allocate any portion of the original cost to the shares of stock of the Chase National Bank and a portion to the shares of stock of Chase Securities Corporation. (R. 70.)

There is no allegation or issue in the pleadings upon which the finding can be predicated and furthermore its conclusions appear to be immaterial in any event. There is of course no question but that appellant's three investments made in 1930 were in one hundred unit lots of Chase Bank and Chase Securities stock, and, as has been pointed out, if the units are to be regarded as "single investments", the respondent but finds himself on the other horn of a dilemma, since it clearly appears that the "single investment" ceased to exist on June 14, 1934, more than two years before the sale of the 300 shares of Chase Bank stock received on that day, and that the sale was of a security received in an exchange and the cost should be apportioned as of the date of the exchange.

The second portion of the finding is entirely without support and if of any significance must be ignored as being outside the record in either Court.

(b) Finding III.

This finding reads:

> "The Court finds that it is neither reasonable nor practicable to allocate to each stock a portion of the amount of the original investment of the plaintiff." (R. 70.)

Since this finding is made, notwithstanding Montgomery's uncontradicted testimony that the cost of the units can be allocated as of the date of purchase, 75% to the Chase Bank stock and 25% to the Chase Securities stock, and of the stipulated market quotations of the day after the dissolution of the units, establishing an allocation ratio of 95% for the Chase Bank stock and 5% for the Chase Securities stock, it must be that the finding is to be regarded as a conclusion of law, that the trial Court considered that either the law or the regulations precluded such allocation either because of the "single investment" character of the original purchase, or because the appellant had not at the time of purchase allocated its cost between the several stocks, a matter neither proved nor in issue.

Since the finding thus in effect becomes a conclusion of law and since its validity is essential to the determination of this appeal, the factual and legal questions are fully open to consideration by the Appellate Court.

The argument in this brief will therefore proceed upon the theory that the Appellate Court should and will examine the record and itself determine the proper conclusions to be drawn from the stipulated facts and the uncontradicted testimony of the single witness whose deposition was taken and introduced by appellant.

3. THE REVENUE ACTS, REGULATIONS AND COURT AND BOARD DECISIONS RECOGNIZE AND REQUIRE THAT COST OF UNITS COMPOSED OF SEVERAL ITEMS BE APPORTIONED.

While the specific application of the rule as to apportionment of cost between several items acquired at a gross or lump sum figure to purchases and sales of units of stock of two or more corporations has been involved in but few decisions, the general problem arises in many transactions involving the determination of tax liability, and no particular difficulty has been experienced in making such apportionment.

(a) Apportionment of cost between depreciable and non-depreciable assets acquired for lump sum.

Perhaps the situation most frequently arising is the apportionment among the components of the cost of land, buildings and equipment purchased for a lump sum price. Apportionment is required in every such instance to establish the basis for depreciation on the depreciable items and ultimately the gain or loss on a resale of the property.

> Reg. 111, Sec. 29.23 (1) 4. "*Capital sum recoverable through depreciation allowances.*—The capital sum to be replaced by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. * * * In the case of the acquisition on or after March 1, 1913, of a combination of depreciable and non-depreciable property for a lump price, as, for example, buildings and land, the capital sum to be replaced is limited to an amount which bears the same proportion to the lump price as the *value*

of the depreciable property at the time of acquisition bears to the *value* of the entire property at that time. * * *"

(b) Apportionment of basis where two kinds of property are received on a tax-free exchange.

It frequently occurs on a tax-free exchange arising from a reorganization or otherwise, that a taxpayer will receive two kinds of property upon the surrender of his original property and, since the law requires the continued use of the basis of the original property in determining gain or loss on the sale of the property received in exchange, there must be an apportionment of that basis. Such a necessity arises, for example, when common stock is exchanged for new preferred and common, or for stock in two new corporations. The courts and Board of Tax Appeals have repeatedly made an apportionment in such cases.

Appeal of Glenn H. Curtiss, 21 B. T. A. 629, 636, quoting from and applying article 1567 of Regulations 62, reading in part as follows:

> "* * * When securities of a single class are exchanged for new securities of different classes so that no gain or loss is realized under the provisions of paragraph (b) of article 1566 (relating to reorganizations), for the purpose of determining gain or loss on the subsequent sale of any of the new securities the proportion of the original cost, or other basis, to be allocated to each class of new securities is that proportion which the market value of the particular class bears to the market value of all securities received on the date of the exchange."

This decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit in *Curtiss v. Commissioner,* 57 F. (2d) 847, 848-9. See also: *Houghton v. Commissioner,* 71 F. (2d) 656, 657-8; *Salvage v. Commissioner,* 76 F. (2d) 112, affirmed *Helvering v. Salvage,* 297 U. S. 106, 80 L. ed. 511.

An analogous situation arises on a partially tax-free exchange where the taxpayer receives non-taxable property together with property of a type not permitted to be received tax-free. Here the statute itself requires an apportionment.

Internal Revenue Code, Sec. 113 (a) (6), providing that property acquired upon a tax-free exchange shall take the same basis for determining gain or loss as the property exchanged, reads:

> "* * * If the property so acquired consisted in part of the type of property permitted by section 112 (b) or section 112 (l) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be *allocated* between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange."

Likewise, where under Revenue Acts prior to 1934, no gain or loss was recognized if a stockholder in a corporation, a party to a reorganization, without surrender of his stock, received stock in other corporations pursuant to the plan of reorganization, such stockholder is required by Reg. 111, Sec. 29.113(a)

(12)-1 (2), to "apportion" the cost or other basis of his original stockholding "between such stock and the stock or securities distributed in proportion, as nearly as may be, to the *respective values* of each class of stock or security, old and new, *at the time of such distribution,* and the basis of each share of stock or unit of security will be the quotient of the cost or other basis of the class of stock or security to which such share or unit belongs, divided by the number of shares or units of each class."

(c) Apportionment where stock is received as a bonus with the purchase of other stock.

Reg. 111, Sec. 29.22 (a)-8 provides:

> "* * * If common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost."
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> * * * * * * *
>
> "(1) If the shareholder does not exercise, but sells, his rights to subscribe, the cost or other basis, properly adjusted, of the stock in respect of which the rights are acquired shall be apportioned between the rights and the stock in proportion to the respective *values* thereof at the time the rights are issued, * * *."

(d) Apportionment of cost where land is purchased for subdividing.

Reg. 111, Sec. 29.22 (a)-11 provides:

"*Sale of real property in lots.*—If a tract of land is purchased with a view to dividing it into lots or parcels of ground to be sold as such, the cost or other basis shall be *equitably* apportioned to the several lots or parcels and made a matter of record on the books of the taxpayer, to the end that any gain derived from the sale of any such lots or parcels which constitutes taxable income may be returned as income for the year in which the sale is made. * * *"

(e) Apportionment of discovery value between land and natural resources for computation of depletion and of accounting.

Reg. 111, Sec. 29.23 (m)-3, providing for the computation of depletion of mines on the basis of discovery value, requires that

"The value must be equitably apportioned between the owners of the economic interest therein."

Reg. 111, Sec. 29.23 (m)-27, providing for aggregating timber and land for purposes of valuation and accounting, reads:

"The timber accounts mentioned in the preceding paragraph shall not include any part of the value or cost, as the case may be, of the land. In a manner similar to that prescribed in the foregoing part of this section the land in a given 'block' may be carried in a single land account or may be divided into two or more accounts on the basis of its character or accessibility. *When such a division* is made, a proper portion of the total value or

cost, as the case may be, shall be allocated to each account.

"The total value or total cost, as the case may be, of land and timber shall be *equitably allocated to the timber and land accounts, respectively.*"

(f) Allocation of cost of production of different products produced by a single process.

Reg. 111, Sec. 29.22 (c)-7:

"*Inventories of miners and manufacturers.*—A taxpayer engaged in mining or manufacturing who by a single process or uniform series of processes derives a product of two or more kinds, sizes, or grades, the unit cost of which is substantially alike, and who in conformity to a recognized trade practice *allocates* an amount of cost to each kind, size, or grade of product, which in the aggregate will absorb the total cost of production, may, with the consent of the Commissioner, use such *allocated* cost as a basis for pricing inventories, provided such allocation bears a reasonable relation to the respective selling values of the different kind, sizes, or grades of product."

(g) Allocation of cost or other basis proper where stock in two corporations purchased as a unit.

The uniformity of apportionment of cost or other basis between different properties acquired as a unit, disclosed in the foregoing instances, indicates that such procedure is likewise proper in the present case where stocks of two corporations are purchased as a unit and under conditions which prevent their separate acquisition or sale, if such apportionment subsequently becomes necessary for the proper determination of

income tax. While at first impression it may appear that the decisions involving this latter situation are not uniform, it is believed that upon examination they will be found to uphold the right of allocation and, that, in any instance where allocation was refused, such refusal was based upon the insufficiency of the evidence of value and not upon the absence of such right.

The Board of Tax Appeals uniformly recognized the right to apportion the cost in cases involving the sale of units of bank and affiliated corporation stocks. The leading decision of the Board, is the *Appeal of Stanley Hagerman,* 34 B. T. A. 1158. Hagerman claimed a loss on the sale in 1933 of "declarations of interest" in the dividends and other distributions of First Security Company, a former affiliate of the First National Bank of the City of New York. These interests had been acquired in 1918, 1919 and 1931 in connection with the purchase of shares of the stock of the bank, each share being endorsed with a certificate of interest in the First Security Company and the interests being alienable only in connection with the sale of the accompanying bank stock. As in the case of the Chase National Bank and as required by the Federal Banking Act of 1933, the First National Bank in December, 1933, divorced its affiliate and on December 9, 1933, Hagerman received bank shares without endorsement and separate "declarations of interest" in the Security Company in exchange for the endorsed bank shares held by him. The Commissioner disallowed the claimed loss on the ground that it was

impracticable to allocate or apportion fairly to the declarations of interest a portion of the unit cost of the certificates representing the bank stock and the declarations of interest in the Security Company.

The Board, however, held, after a review of the authorities, that such apportionment was proper and could be made upon the testimony of expert witnesses as to such values. The Board after stating the issues says (pp. 1164-1166):

> "The statute applicable to the issues involved herein is found in the Revenue Act of 1932, sections 111 (a) and 113 (a). That act and prior acts provide for an apportionment of cost under certain circumstances, the method of apportionment of cost of property received in connection with tax-free distributions being left to rules and regulations prescribed by the Commissioner. See *Philip D. C. Ball,* 27 B. T. A. 388, 394; affd., *Von Weise v. Commissioner,* 69 Fed. (2d) 439, and authorities therein cited. Article 58 of Regulation 77, which is quoted by both petitioner and respondent herein, provides in part as follows:
>
> "* * * Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost.

"Inasmuch as both parties have quoted said article, they seem to be in accord that this is a case arising thereunder. No regulation seems to provide definitely for an apportionment of cost under the exact circumstances arising in this case, but it comes within the general principle embodied in the above statute and regulations."

* * * * * * *

"By the testimony of witnesses and other evidence in the record, it was, in our opinion, shown that the fair market price of the aforesaid units at all times exceeded the market value of the Bank stock if considered separately and so offered for sale. Each of the two stocks, or interests, at all times had a value. The aforesaid agreement between stockholders that neither stock should or could be sold separately did not have the effect of depriving either stock of its value nor, in our opinion, did the agreement make the determination of their separate values impossible or impracticable. Cf. *Collin v. Commissioner,* 32 Fed. (2d) 753; *Newman v. Commissioner,* 40 Fed. (2d) 225, 227; certiorari denied, 282 U. S. 858; *Tex-Penn Oil Co. v. Commissioner,* 83 Fed. (2d) 518.

"There were no actual sales of either Bank stock or Security Co. stock separate from the other at any time prior to December 1933, so that it is impossible to determine the values of either stock on the basis of sales. *The absence of sales, however, in our opinion, does not necessarily make impossible or impracticable the determination of the fair market value of the separate stocks or interests or their value for the purpose of apportionment.*

> "We have heretofore held: 'The absence of active trading in a stock does not necessarily show lack of fair market value, and under the circumstances other evidence, including evidence as to the intrinsic value of the assets back of the stock, should be considered in determining whether the stock had a fair market value.' *George M. Wright,* 19 B. T. A. 541, 548; affd., 50 Fed. (2d) 727; certiorari denied, 284 U. S. 652. See also *George W. Griffiths,* 25 B. T. A. 1292; affd. 70 Fed. (2d) 946; *Helvering v. Kendrick Coal & Dock Co.,* 72 Fed. (2d) 330; certiorari denied, 294 U. S. 716." (Emphasis supplied.)

The Board discusses the *Appeal of Tex-Penn Oil Co.,* 28 B. T. A. 917, 961-966; *Appeal of T. W. Henritze,* 28 B. T. A. 1173, and *Collin v. Commissioner,* 32 F. (2d) 753, all to the effect that a voluntary agreement restricting the sale of stock of a corporation does not prevent the stock from having a fair market value.

The Board then considered the *Appeal of Erskine Hewitt,* 30 B. T. A. 962, and the *Appeal of Edwin D. Axton,* 32 B. T. A. 613, cited by the Commissioner as authority for refusing apportionment and says (p. 1168):

> "In the instant case the situation is quite different, as our findings of fact show, and 'It is well settled that where property is acquired en bloc or en masse and subsequently sold in lots or parcels, a computation of gain or loss must be made upon each separate sale and the result reported in the tax return and not held in abeyance or suspense until the entire cost of the prop-

erty is recovered.' *Bancitaly Corporation,* 34 B. T. A. 494, 504. The principle above enunciated, in our opinion, is applicable in the instant case, since *it is not impracticable in the circumstances to apportion fairly the cost of the component elements making up a unit of said Bank stock and the endorsement thereon of beneficial interest in the Security Co.*" (Emphasis supplied.)

* * * * * * *

"Impracticability has been defined as incapable of being effected from lack of adequate means, impossible of performance, not feasible. *Des Portes v. Southern Railway Co.,* 69 S. E. 148; *People v. Poly,* 40 N. Y. S. 990, 992. Also it has been said that 'impracticability' and 'impossibility' are of equal legal effect. *Cosden Oil & Gas Co. v. Moss,* 267 Pac. 855. We cannot believe that it was 'impracticable' to arrive at separate valuations upon the Bank stock and the certificate of participation in the Security Co. in this case. Obviously, it was not impossible, not even particularly difficult. The evidence used was competent under the *Axton* case, *supra,* and the difference of opinion between the witnesses was no more than indicative of good faith testimony."

The Board also referred to the *Appeal of Glenn H. Curtiss,* 21 B. T. A. 629, affirmed 57 F. (2d) 847, *supra,* and *Salvage v. Commissioner,* 76 F. (2d) 112, *supra,* as other instances where apportionment had been made of the cost of stock included in a unit purchase or acquisition.

The decision of the Board concluded (p. 1170): "*that it was possible and practicable to apportion*

fair market value to the certificates or declarations of interest at the time of purchase thereof". This decision was affirmed by the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Hagerman,* 102 F. (2d) 281.

In the *Appeal of Barber Securities Corporation,* 45 B. T. A. 521, one of the issues involved the apportionment of unit cost of Chase National Bank and Amerex Holding Corporation stocks, the taxpayer claiming a loss on the sale of the latter stock. The Board adhered to its decision in the *Hagerman* case, saying, page 527: "There is thus ample authority for an apportionment if the same be practicable". The evidence of value before the Board consisted entirely of a stipulation as to the net asset values of the capital stocks of the respective corporations as shown by their books at the date of acquisition. While this evidence alone might have been sufficient, the stipulation went further and stated "that the book figures do not reflect appreciation or depreciation in market value above or below cost of the underlying assets". The Board says (p. 527):

> "Hence, the book figures cannot be accepted as showing the true value of the shares of the separate corporations. There is no opinion evidence of values nor any record of separate earnings of the securities companies. Accordingly, there is no factual basis upon which we can apportion petitioner's cost."

In the *Appeal of Orvilletta, Inc.,* 47 B. T. A. 10, the Board was again asked to apportion cost between

shares of the Chase Bank and Chase Securities Corporation which had been acquired by the taxpayer in exchange for shares of the Equitable Trust Company and its affiliate, the Equitable Corporation. The taxpayer sought first to allocate the cost of the units of Equitable Trust Company and its affiliate and then to carry forward such allocation as the cost, respectively, of the Chase Bank and Chase Securities stocks. The Board, without questioning the right of allocation, held that the petitioner had not shown a sound basis for the allocation.

In the *Appeal of Andre deCoppet,* 38 B. T. A. 1381, the taxpayer claimed a loss on the liquidation of the Continental Corporation of New York, an affiliate of the Continental Bank and Trust Company of New York, *which was dissolved without assets and without distribution of its shares,* the Board refused to make an allocation of cost between shares of the Continental Bank and the beneficial interests in the Continental Corporation because of the involved transactions surrounding the acquisition of the interests. However, it again affirmed the correctness of its decision in the *Hagerman* appeal. The Circuit Court of Appeals for the Second Circuit in affirming the Board's decision, *deCoppet v. Commissioner,* 108 F. (2d) 787, advances the theory that the original investment was single and no loss could be claimed on the dissolution of the affiliate. The Circuit Court of Appeals for the Third Circuit, in *Wise v. Commissioner,* 109 F. (2d) 614, involving the same decision of the Board, the appeal of Wise having been con-

solidated with the appeal of deCoppet for trial before the Board, likewise affirmed but *found no conflict with the Hagerman decision.*

In *Pierce v. United States,* 49 Fed. Supp. 324, the Court of Claims had before it the precise situation that confronted the Board in the *Hagerman* case so far as the right of apportionment is concerned, as it was considering the right to deduct a loss from the sale in 1934 of certificates of interest in First Security Company. However, a comparison of the decisions shows that the evidence on the subject of the values of the respective items of stock making up the unit was not the same before the Board as before the Court. While the Court first bases its decision on the ground that upon the evidence before it apportionment was not practicable, it follows that statement with an analysis of the evidence of value characterizing it as but a "rough estimate when by patience an exact answer may be obtained". In view of that statement, the Court's criticism of the *Hagerman* case is clearly unwarranted.

It is submitted that in the cases cited, where the Board or a Court has refused to make an apportionment of the unit cost of banking corporation and affiliate stocks, such refusal was based not upon any question of the right to such an apportionment, but was in every instance the result of the failure to introduce evidence furnishing a factual basis for such an apportionment. It follows that the first proposition involved in this case is definitely answered and *that the cost of the acquisition of Chase units can be ap-*

portioned between the components. Therefore but one question remains for consideration, viz.: Did the appellant establish a factual basis for apportionment? This question will now be discussed.

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4. BASIS FOR APPORTIONMENT.

(a) Consideration of evidence introduced in other cases involving unit purchases of Bank and affiliate stocks.

In the foregoing discussion it appears that in several cases apportionment was refused for lack of a factual basis in the evidence from which the unit cost could be allocated. An examination of the evidence introduced in these cases is a necessary preliminary to a consideration of the evidence before the Court in the present case. In that connection it is interesting to note that in cases involving *losses* from sales of components of unit holdings of stock, the Commissioner uniformly argues that apportionment is "impracticable", while in cases involving *profits* from such sales no such impracticability seems to exist. In fact in the case of *Houghton v. Commissioner,* 71 F. (2d) 656, cited *supra,* the Circuit Court of Appeals for the Second Circuit, where the taxpayer was resisting an assessment of income tax on an alleged profit from the sale of preferred stock received with common stock on an exchange, held that the *burden was on the taxpayer* to show that "an accurate appraisal, a genuine forecast of market value, was impossible". (p. 658.) The Commissioner, in the *Houghton* case, determined "market value" through a for-

mula using the average income of the company for five years and an appraisal of the tangibles. He then deducted from the average income, eight percent of the tangibles and capitalized the remainder at fifteen percent to obtain the value of the intangibles. The value of the common stock was the sum of the tangibles and intangibles less the part of the preferred stock. The Court, after conceding that in some instances a fair market value does not exist, pointed out that the shares sold by Houghton represented an "old, profitable, thoroughly seasoned business which had paid large dividends and was as stable as such ventures could well be", said, page 658:

> "*Although these had not indeed been dealt in, so far as appears, there may have been persons, familiar with such securities, when listed upon an exchange, or traded in as unlisted stocks, who would have undertaken to appraise them, and whose estimates would have been a reliable judgment as to their 'market value'.* That is not an uncommon way for example to appraise real property. Although each parcel is unique, a good appraiser will often predict its market price with surprising accuracy. Moreover, the conditions of a market might by proper publicity here have been created; a number of competing buyers, not confined to this investment. We cannot regard the evidence of the taxpayers as foreclosing that possibility; and it was on them to show that an accurate appraisal, a genuine forecast of market value, was impossible. This they might have done directly by calling witnesses, or as in *Collin v. Com'r, supra,* 32 F. (2d) 753 (C. C. A.), and

> *Taylor v. Com'r, supra,* 70 F. (2d) 619, by showing the inherent vice of the Commissioner's method. They have done neither and we can only assume that they could not do so." (Emphasis supplied.)

In other words, "market value," can be determined by formula, *or by opinion evidence* and the apparent absence of a market is no barrier to such determination. In that connection it should be noted that "fair market value" or even "market value" is not essential to apportionment. In the apportionment of cost between depreciable and non-depreciable assets, the allocation is on the respective "values" (3-(a), *supra*), and, while the expression "fair market value" is used in providing for the apportionment of basis on a tax-free exchange (3-(b), *supra*), the requirement in the case of stock received as a bonus is that the basis "be fairly apportioned," or in the case of stock rights, in proportion to the "respective values," (3-(c), *supra*). Likewise, in the apportionment of cost where land is subdivided and where depletion of discovery value is to be made, the costs are "equitably" apportioned or allocated (3-(d) and (e), *supra*).

In the *Hagerman* case the Board specifically comments on the fact that market value of the respective stocks can be determined, notwithstanding the impossibility of a separate transfer.

Wherein, then, did the taxpayers' proof fail in the cases where apportionment was refused?

In the *Appeal of Barber Securities Corporation,* 45 B. T. A. 521, *supra,* as has been noted, the only evi-

dence submitted was of the net book values of the capital stock of the respective corporations as of the date of acquisition of the units with the admission in the stipulation of facts that these values did not reflect appreciation or depreciation in market values. Commenting on this evidence the Board says (p. 527):

> "The parties have stipulated the book values as of the date of acquisition by petitioner of the stock of the Chase Bank and Chase Securities and similarly as to the Commercial Bank and the Commercial Corporation. They further stipulate, however, that the book figures do not reflect appreciation or depreciation in market value above or below cost of the underlying assets. Proof of market value as of the date of the acquisition of the stocks is essential to our inquiry. We believe this lack of proof to be a fatal bar to petitioner's contention. We do not know when the underlying assets were acquired, but, considering the history of the times before and after 1930, of which we take judicial notice, we can not assume that the book values represent true market values. Hence, the book figures can not be accepted as showing the true value of the shares of the separate corporations. *There is no opinion evidence of values nor any record of separate earnings of the securities companies.* Accordingly, there is no factual basis upon which we can apportion petitioner's cost. *Edwin D. Axton,* 32 B. T. A. 613. Cf. *deCoppet v. Helvering,* 108 Fed. (2d) 787; also *Stanley Hagerman, supra,* where the Board was furnished with opinions of market value, the separate earnings of the Security Co., and other forms of evidence not presented here." (Emphasis supplied.)

In the *Appeal of Orvilletta, Inc.,* 47 B. T. A. 10, *supra,* while the taxpayer avoided the objection fatal in the *Barber* case by setting forth the book values of the Equitable Corporation *with securities at market prices,* thus furnishing a basis for apportionment between the stock of that affiliate and the Equitable Trust Co., the proof failed for the reason that these separate values could not be applied to the shares of Chase Securities and Chase Bank stocks respectively received in exchange. The Board says:

> "However, assuming that we accept petitioners' alleged allocations, their position is still without merit. Upon the exchange of the Equitable Trust Co. and Equitable Corporation units petitioners received stock in the Chase Bank and Chase Securities Corporation. Petitioners claim that the Equitable Trust Co. stock was exchanged for the Chase Bank stock and Equitable Corporation stock was exchanged for Chase Securities Corporation stock. If this be true it is contrary to the stipulated facts, for in the wording of the stipulation:
>
> * * * the aforesaid 100 units of stock consisting of said 100 shares of the capital stock of The Equitable Trust Company of New York and of said 100 shares of the capital stock of The Equitable Corporation of New York were exchanged by each of these petitioners for 80 units of stock consisting of 80 shares of the capital stock of the Chase National Bank of the City of New York and of 80 shares of the capital stock of Chase Securities Corporation.
>
> Ignoring this part of the stipulation, we refer to the documents attached and incorporated

therein. From these we see that there was no real separation and that what was contemplated was an issuance of units of Chase Bank stock and Chase Securities Corporation stock at a ratio of 8 to 10 for the units of the Equitable Trust Co. and Equitable Corporation stock. Neither Chase Bank nor Chase Securities stock was transferable separately. The quotations on the market were for a unit of one share of Chase Bank stock and one share of Chase Securities stock. The legend which each certificate bore shows further that the stocks were inseparable. Therefore, even though it were possible to determine separate cost bases for petitioners' Equitable Trust Co. and Equitable Corporation stocks, they were exchanged for inseparable units. We are unable to determine from the record that the cost of the Chase Bank stock was the Equitable Trust Co. stock and the cost of the Chase Securities stock was the Equitable Corporation stock.

Moreover, if we were able to so determine, we would be faced with a still further dilemma. It was stipulated that in November 1931 the original cost bases were reduced by certain so-called wash sales. Even if the Chase Bank and Chase Securities stocks had had separate cost bases, we would be unable to determine which of those bases was so reduced, or, if both were reduced, what amount of the reduction is allocable to each. It is inconceivable that the reduction on both would be in exact proportion to the alleged cost basis of each.

We find it impossible to determine separate cost bases for the component parts of the inseparable units of Chase Bank and Chase Securities stock."

In *Pierce v. United States,* 49 Fed. Supp. 324, *supra,* the Court of Claims, considering the practicability of opportioning costs of units of the First National Bank of the City of New York and its affiliate, the First Security Corporation, to determine a loss on sales of declarations of interest in the affiliate, had before it balance sheets of the Bank and the affiliate valuing the assets at fair market value as of the dates of the purchase of units (p. 328) and the testimony of witnesses suggesting values on the basis of a ratio of price to book value as between stocks of Banks with affiliates and of Banks without affiliates (p. 330). These suggested values differed widely from those arrived at by valuing assets, and the Court refused to accept either, saying (p. 330):

> "Either of these methods seems plausible to us, as a rough guess at a value that might be attributed. But we do not think that the situation calls for such a rough estimate, when by patience the exact answer may be obtained."

It must be confessed that it is difficult to understand why the Court of Claims rejected the asset value formula because of the "rough guess" of the witnesses on another basis of valuation, unless it was for a reason not stated, viz.: the failure to provide earning statements of the two companies from which the value of intangibles could have been computed under the formula approved in the *Houghton* case, 71 F. (2d) 656, *supra.*

However, it is important to consider two differences between the situation with reference to the First Na-

tional Bank of New York and the Chase National Bank. In the first place, the Court in the *Pierce* case found (p. 328):

> "The reports of the condition of the Bank at the close of business April 30, 1928, March 31, 1930, and November 30, 1932, contain no reference to the Security Company. The Security Company never made public any information concerning its assets, liabilities, earnings, or sources of income."

This information was available as to the Chase Securities Corporation. (Deposition R. 44-45.) In the second place, the Court notes (p. 329) that the First National stockholders were but beneficiaries of a trust of which the First Security Corporation stock constituted the corpus, a trust over which they had only a limited control. On the other hand, the stockholders of Chase Bank were actual stockholders of Chase Securities Corporation.

In the *Appeal of Andre deCoppet,* 38 B. T. A. 1381, *supra,* the Board places its refusal to apportion costs mainly on the ground that the taxpayer never had an investment in the affiliate, whose stock was held by trustees, but only in the Bank. Apparently the only evidence of value for apportionment arose from Bank stockholders' purchase of bank stock at $40 per share, $10 of which the Bank was authorized to pay as subscription to two shares of the affiliate. In refusing to apply the rule of the *Hagerman* case, the Board said (p. 1394):

> "But if it were proper to consider the petitioners' investment as divisible between the bank

shares and the beneficial interest in the investment shares, the question of the practicability of apportionment of basis would become important. We should find such an apportionment wholly impracticable. There is only a short parallel of the complex circumstances of acquisition here, as in deCoppet's case, and the comparatively simple circumstances of the transactions considered in *Stanley Hagerman, supra. These petitioners bought shares for cash, acquired them by inheritance, in discharge of loans, as dividends, and by the exercise of rights; both corporations canceled shares, the bank participated in a merger which involved a change in the investment corporation's share structure, and its assets and liabilities were shifted for the convenience of the bank.* The problem of computing the basis of shares in the investment corporation is thus far more difficult than in the cases cited.

Complexity and difficulty of computation are in themselves insufficient reasons for denying the deduction, and neither the Commissioner nor the Board may refuse to ascertain the amount of deduction merely because its computation is a burdensome task. The question whether an apportionment is practicable, however, goes further.

If this case had involved but the sale by each petitioner of a separate share in the investment corporation received from the trustees at a time when the shareholder's right thereto was the direct result of his paying the $40 to the bank upon the understanding that $10 would be turned in to the investment corporation, the gain or loss from such a sale might have been computed upon the basis of such $10 for each two shares sold. That, however, is not the question to be decided.

> The acts of June 1929 were still more complex and were soon enmeshed in such later transactions as obscured them entirely. Any calculation of a separate basis would require some appraisal of several imponderable factors. The $2,000,000 gain in Thirty Broad Street shares is illustrative. The apportionment would be entirely artificial and quite unworthy of use—hardly reliable enough to be called 'practicable.' " (Emphasis supplied.)

Having studied the factual background of the cases refusing allocation of unit costs, the situation in the *Hagerman* case, 34 B. T. A. 1158, where allocation was made, should be considered. The Board in its findings of facts on pages 1161-1164 of the report, details this evidence, all of which was stipulated: The balance sheets of the Bank and the affiliate at relevant dates; the earnings of the Bank and the affiliate on these dates, the dividends declared; net asset values, exclusive of goodwill and other intangibles on these dates; and the market value of the units at all times exceeded the market value of the Bank stock alone. From these stipulated facts the Board found that "it was practicable to apportion fairly the cost or market value of the unit of the Bank and Security Co. stock between the two stocks by valuing the Bank stock and subtracting that value from the value of the unit." (p. 1164.)

In the *Appeal of Glenn H. Curtiss,* 21 B. T. A. 629-637, the Board in apportioning to new securities received on a tax-free exchange in July 1923 used as a basis sales prices on the New York Exchanges in February and April 1924.

Where, as in the present case, there is no market in the sense that the stock was dealt in by such a multitude of persons and in such large number of transactions as to fix a standard price, the Court must accept substitute proof of what price would be paid if a willing buyer and a willing seller met. The rule is well stated in *Helvering v. Kendrick Coal & Dock Co.,* 72 F. (2d) 330, where the Circuit Court of Appeals for the Eighth Circuit says (p. 333):

> "To ascertain the fair market value of property, as the Treasury Regulations above quoted import, it is not necessary that the property actually shall have been sold in a market. Where personal property is sold in a definite and established market, or changes hands for money so regularly that a market price for it is created or maintained, it is obvious that it must have a fair market value. When the question arises as to its fair market value in litigation, the question merely is as to the price it commanded in the market at the particular time. Where, however, there is no such market, but the property has an intrinsic value, then the evidence must show what price that intrinsic value would command on a market where willing buyer and willing seller met."

As was pointed out by the Circuit Court of Appeals for the Second Circuit in *Houghton v. Commissioner,* 71 F. (2d) 656, 658 (quoted *supra*), it is proper, in cases where no actual market exists, to receive as evidence of market value *appraisals* of such values by persons familiar with the securities. Likewise, the Circuit Court of Appeals for the Third Circuit, in

Heiner v. Crosby, 24 F. (2d) 191, holds that the market value of stock may be established by opinion evidence, saying (p. 193):

> "The fair market price or value of stock at a particular time is a question of fact, to be determined from all the circumstances. Market price implies the existence of a market, of supply and demand, of sellers and buyers. Sales are always evidence of a market price. * * * Sales made under peculiar and unusual circumstances * * * may neither signify a fair market price or value, nor serve as the basis on which to determine the amount of gain derived from the sale. *In such cases resort must be had to evidence to determine 'fair value'. Offers made in good faith and opinions of intelligent men experienced in the business are admissible to show fair value."* (Emphasis supplied.)

See also the recent decision of the Supreme Court in *United States v. Miller,* 317 U.S. 369, 374, 63 S.Ct. 276, 279, 87 L. ed. 336, 343, where the Court, reviewing a condemnation award and speaking of opinion evidence, says:

> "Where, for any reason, property has no market, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with a nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. *Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in signifi-*

cant amounts, the application of this concept involves, at best, a guess by informed persons." (Emphasis supplied.)

The evidence introduced by appellant will now be examined and will show that in the present case proof has been supplied sufficient to afford a basis for allocation within the decisions just reviewed.

(b) Appellant's evidence establishes that the unit cost should be allocated 75% to the Chase Bank stock and 25% to the Chase Securities (Amerex) stock.

To establish a basis for the allocation of the cost of the units of Chase Bank and Chase Securities stocks, appellant offered the testimony of Thomas C. Montgomery, of Washington, D. C.

Mr. Montgomery is a man of 53, with an A. B. degree and an L. L. B. degree from Harvard. He practiced law from 1914 to 1917 and in March, 1920, upon his return from World War I, went into the securities business. This has ever since been his business. He started as a salesman with Securities Sales Company of Atlanta, Georgia. In 1921 he became a securities salesman for the Equitable Trust Company of New York. Later he instituted and managed a bond department for the Guardian Trust Company of Houston, Texas. Later he went into the mortgage business in Washington with the Real Estate Mortgage and Guaranty Corporation where he stayed four years. In 1927 he participated in the formation of Waggaman, Brawner & Company, a member of the Washington Stock Exchange, to deal in investment

securities generally. In September, 1942, Waggaman, Brawner & Company merged with Ferris, Exnicios & Company, and Mr. Montgomery is presently affiliated with that firm. (Deposition, R. 35-38.)

As a part of Mr. Montgomery's business he appraised and valued stocks for others and from the early part of 1930 the appraisal and valuation of bank stocks formed a large percentage of his work. From 1930 he dealt in bank stocks right along. He watched the market especially on the New York bank stocks, the leaders, Chase, National City, Manufacturers, Irving Trust, etc. He also had experience in valuing the stocks of securities and investment companies. He testified that he was a member of the Washington Stock Exchange; that in the course of his business he had occasion to inquire into the value of and to make studies of the value of the common stock of the Chase National Bank and of the Chase Securities Corporation; that he was familiar with the values of those stocks as of the early part of 1930 and that he was familiar with the agreement preventing separate transfers of the two stocks. Having thus qualified and having in mind the restriction on separate transfers of the stocks, Mr. Montgomery testified that Chase Bank stock, independently of any value attributable to the stock of Chase Securities, had a value of $127.88 per share on March 3, 1930, of $124.10 per share on April 8, 1930, and of $128.25 per share on April 24, 1930. The dates are the dates of plaintiff's purchases of the units. (Deposition, R. 38-42.) These values establish the cost of the Chase Bank stock at

75% of the unit cost as against 70% used in computing the refund claim.

Mr. Montgomery described the method followed by him in arriving at the foregoing values. He took the information available to the ordinary investor supplied by the 1931 edition of Moody's Manual of Securities of Banks and Standard and Poor's Manual, from which he found that on December 31, 1929, the date nearest the dates of purchase, the book value of Chase Bank and Chase Securities together was $65.25 per share, of that the book value of Chase Bank alone was $45.97 and of Chase Securities alone was $19.28, a ratio of 69 to 31; at the end of 1930 the total book value was $63.02, of the Bank alone $48.35 and of the affiliate alone $14.67, a ratio of 77 to 23. The dividend record, to which the witness gave a good deal of weight, showed the payment in 1927 and 1928 of dividends of $18 per unit each year of which the Bank contributed $14 and the Securities Company $4. In 1929 the stock was split five for one. For the first three quarters of 1929 the dividends continued as in the two previous years, after the split-up the dividend basis was $4 per year, $3 from the Bank and $1 from the Securities Company, a ratio of 75 to 25. The witness then testified (R. 45-46):

> "In my opinion, an investor buying a bank stock, or in this case a bank and securities stock together, would look at the contribution of income from the bank and securities company and would look at the relative book values. But I, and I think the investor, would pay more attention to

the dividend income, because as I said earlier, the book value of a securities company fluctuates much more than the book value of a bank, which is relatively stable.

"I find that the dividend income for about two and a half years preceding—I have given the figures, that 78 per cent came from the bank and 22 from the securities company. In the months immediately preceding the dates of purchase of this stock the relative figures were 75 per cent from the bank and 25 from the securities company. Therefore, I would say that in my opinion the investor was paying 75 per cent of his purchase for the bank stock and 25 per cent for the securities company, and that is the basis of my figures."

Further, on cross-examination, Mr. Montgomery, gave the earnings of the affiliated companies per share as set out in the manuals, as follows:

	Bank	Securities Co.
1928	15.87	1.69
1929 (on the new stock)	3.49	1.46
1930	not available	1.07

The ratio of earnings in 1929, the last year available to a prospective purchaser in 1930, was 70 to 30. (Deposition, R. 51-52.)

The cross-examination (Deposition, R. 49-68) thoroughly demonstrated that Mr. Montgomery was basing his opinion of relative values on the knowledge of the affairs of the corporation that would be available to the man on the street, which is essentially the knowledge that creates market value. He recognizes that others might form other opinions of value and

points out that without difference of opinion on values you have no market. (Deposition, R. 59.) He further (R. 65) disposes of the suggestion that an appraisal of the assets of the two companies would furnish a more accurate valuation, with the statement that the Bank would not have permitted such an appraisal and that such method was not used in the securities business. In that connection, it should be pointed out that to an investor who is going to buy a hundred units of Chase stock, an investment of say $15,000 to $20,000, such a method of valuation is unavailable both from a financial and a practical viewpoint since the combined assets of the two corporations approximated half a billion dollars. It is obvious that the trader must determine values on a practical basis and that a method considering total asset values, dividends and earnings, which is the basis upon which the unit values were fixed in the stock market, is validly used in making an apportionment of the cost of the units to the component stock.

Mr. Montgomery's testimony is uncontradicted and it is submitted his opinions as to relative values must be accepted and applied to the present case.

(c) Proper date for apportionment.

The appeal has been briefed so far on the assumption that the basis of apportionment of the cost of the Chase units was their respective values at the date of acquisition. That was the assumption in all the cases discussed and seems the logical date. However, it has been suggested, and the Commissioner's argument that the units are a single unitary investment

strengthens the validity of that suggestion, that the cost should be apportioned as of the date of the termination of the inseparable character of the unit, here June 14, 1934, when the tie-in was abolished to conform to the Banking Act.

The suggestion was first made in the dissenting opinion in the *Hagerman* case, 34 B. T. A. 1170, where it is said:

> "If the unit which he bought—the bank stock with the endorsement—had been sold, gain or loss would have been computed upon its cost. But he did not sell it as a unit. He surrendered it on December 9, 1933, and, in the language of the majority, 'in exchange therefor * * * received * * * certificates of Bank stock without said endorsements and declarations of interest.' This, it seems to me, is analogous to the situation which the Board had before it in *Glenn H. Curtiss,* 21 B. T. A. 629. It was there held that the cost of the exchanged securities should be apportioned to the securities received in the exchange according to the respective market values of the securities at the time received in the exchange. * * *
>
> "In *H. A. Green, supra* (33 B. T. A. 824) we pointed out that while there is no specific provision in the statute directing an apportionment of cost between two or more kinds of property received in a nontaxable exchange (which, it seems to me, is what we have here) still article 1567 of Regulations 62, interpreting the Revenue Act of 1921, must be considered as laying down a principle which is equally applicable in determining gain or loss under subsequent revenue acts. This regulation provides in part as follows:

> '* * * the proportion of the original cost, or other basis, to be allocated to each class of new securities is that proportion which the *market value* of the particular class bears to the *market value* of all securities received on the date of the exchange. * * *' (Italics supplied.)
>
> "This is certainly a more 'practicable' solution of our problem than that adopted by the majority."

As the record shows, appellant *surrendered* his "unit" security on June 14, 1934, and received new certificates for 300 shares of Chase Bank stock and 30 shares of Amerex (formerly Chase Securities) stock, and if the transaction is to be likened to a tax-free exchange, the respective values of the components should be fixed as of that date. Furthermore, such treatment has the advantage, so far as valuation is concerned, of values as of that date established on an open market. The ratio as of that date is approximately 95% to Chase Bank and 5% to Amerex.

CONCLUSION.

It is submitted that the following propositions have been established:

1. That upon a sale of one of the components of a unit purchase of Chase Bank and Chase Securities stocks, after the removal of restrictions on separate transferability, gain or loss on the sale can be determined by allocating the unit cost to the respective components according to their respective values;

2. That the inseparability of the units does not prevent the stocks having independent market values;

3. That such separate values can be established by the testimony of a witness qualified to make such appraisal;

4. That the uncontradicted evidence in this case establishes that if the date of acquisition be taken for allocation, the Chase Bank stock represents 75% of the unit cost and the Chase Securities stock represents 25% of such cost;

5. That the stipulated facts in this case establish that, if the date of the dissolution of the units be taken for allocation, the Chase Bank stock represents 95% of the unit cost and the Chase Securities stock represents 5% of such cost; and

6. That the judgment appealed from should be reversed with directions to enter judgment for appellant.

Dated, San Francisco, California,
June 26, 1943.

Respectfully submitted,
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T. M. WILKINS,
Of Counsel.